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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN DIONICIO CASTRO,

Defendant and Appellant.

G051730

(Super. Ct. No. 09CF1139)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed as modified.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Lise S. Jacobson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Juan Dionicio Castro guilty of attempted premeditated murder and first degree murder; and found true allegations Castro committed both crimes for the benefit of, at the direction of, or in association with a criminal street gang, personally discharged a firearm during the commission of the attempted murder, committed premeditated murder while an active gang member with the intent to further the gang's activities, and vicariously discharged a firearm causing death while an active street gang member with intent to benefit or promote a criminal street gang.

The court imposed an indeterminate term of life with the possibility of parole for the attempted murder, plus 10 years for the gang enhancement and 20 years for personal discharge of a firearm; plus a consecutive term of life without the possibility of parole for the murder, plus 25 years to life for vicariously discharging a firearm death.

Castro challenges the sufficiency of the evidence to prove both counts, and he argues the relative weakness of the evidence to prove his identity as the murderer caused reversible "spillover prejudice" to the attempted murder. He also argues his attorney's failure to object to testimony about one witness's prior statements constitutes prejudicial ineffective assistance of counsel, and the trial court exacerbated the error by giving CALCRIM No. 318 [prior statements as evidence]. We reject these arguments.

Nevertheless, Castro correctly identifies three sentencing errors, and we modify the judgment accordingly. As modified, the judgment is affirmed.

FACTS

Attempted Murder

In 2009, Castro, was a member of Walnut Street, a typical Hispanic street gang located in Santa Ana. One common characteristic of Hispanic street gangs is the desire to claim a specific geographical area of a city like Santa Ana "as their own," or "turf." Walnut Street's main rival was the Lopers. However, the gang shared a boundary with the West Myrtle Street gang, and there had been recurrent violence between the gangs for some years.

Gilardo Anguiano claimed membership in West Myrtle Street and the Crazy Block Crew (CBC) “tagging” crew associated with West Myrtle Street. However, Anguiano lived with his sister, parents, and other siblings in a home on South Pacific Street in Santa Ana, in a neighborhood claimed by Walnut Street.

On the morning of April 4, Anguiano’s sister saw two young Hispanic men with shaved heads spray “CW” and “CWR,” initials associated with Walnut Street, on her garage door and threatened her with a gun.

Later that morning, Anguiano, his mother, and sister were standing in the front yard when a woman identifying herself as “Chico’s mother” accused Anguiano of shooting at her house and tagging the nearby alley.

About the same time, Castro drove by in his green Lincoln Continental. He made a U-turn at the end of the block, and then drove by the house again. This time, Castro stared at Anguiano.

Within hours, someone crossed out the “CWR” on Anguiano’s garage, and spray painted, “Spooky,” a Walnut Street gang member’s nickname, and the letters “CBC,” on a wall of Anguiano’s house.

That evening, Anguiano and Spooky were standing outside Anguiano’s house when they saw a silver car pull to the curb, and Castro’s green Lincoln come to a stop in an intersection about 150 feet away from them. Castro stepped out of his car with a gun in his hand, and he fired at least one shot at Anguiano and Spooky. Someone fired several shots at Castro before he drove away. Police investigators found five .380-caliber shell casings in front of Anguiano’s house, and one, nine-millimeter shell casing nearby.

Lamberto Pedraza, one of Anguiano’s neighbors, testified under a grant of immunity. He described the shooter as a thin, male Hispanic, with short hair, between 18 and 20 years of age, and standing about five feet, four inches tall. This description roughly matched Castro, and Pedraza tentatively identified Castro’s picture in a pretrial photographic lineup. At trial, Pedraza said he only saw the shooter from behind.

Efrin Mercado, a former Walnut Street gang member, who also testified pursuant to a grant of immunity, said Castro claimed responsibility for the shooting a couple of days later. Castro told Mercado he tried to warn the West Myrtle Street taggers about their graffiti, but they were not paying attention to him. Castro suspected Anguiano because Anguiano was a member of the CBC tagging crew. Castro also told Mercado that he stopped his car, got out, and “started shooting at them,” and that he kept the nine-millimeter handgun.

Murder

Castro spent the evening of May 1 with his girlfriend, Karina Garcia, and fellow Walnut Street gang member, Arturo Gonzalez. According to Garcia, Castro and Gonzalez left the house together at around 10:00 p.m.

Less than five minutes later, and about a block away, Gonzalez and another young Hispanic male approached Orange County Criminals (OCC) gang members Mario Chutan, a gang member named, Spider, and Angela Courette, Chutan’s girlfriend, as they stood outside a party on West Pine Avenue. The location was in West Myrtle Street’s claimed territory.

Witnesses heard Gonzalez yell, “Where are you from?” Chutan and Spider advanced toward Gonzalez and his companion. Gonzalez walked to the middle of the street to meet them. Chutan and Gonzalez exchanged words and punches, while Gonzalez’s companion walked closer to them with a gun in his hand. Someone yelled, “Walnut Street,” and made a derogatory reference to the Lopers gang before firing several shots at Chutan and people standing near him. The shooter and Gonzalez fled the scene before police could arrive.

Chutan died from gunshot wounds, and three other people were wounded. A ballistics expert testified the shooter killed Chutan with the same nine-millimeter handgun that had been used in the attempted murder of Anguiano.

Garcia testified Castro came home 30 or 40 minutes after he left with Gonzalez. When she asked Castro where he had been, he told her either “not to ask” or “stay out of his business.”

Around 7:00 a.m. the next morning, the police raided Castro’s house. They found Castro inside, and Gonzalez was apprehended running away from the house. Investigators did not find a nine-millimeter gun, nor ammunition for one in Castro’s home. They did find a few .38-caliber shells in a speedy loader.

When questioned, Castro denied leaving his house on the night of the murder, and he said he spent the evening with Garcia. Castro admitted he and Gonzalez were together “at some point” that night, but he was “very evasive” about the timing.

Courette positively identified Gonzalez, but she told the police the shooter was another Walnut Street gang member with the moniker “Mono.” At the time, the only known Mono from Walnut Street was in custody. Courette said the shooter had a shaved head, but he was wearing a hood.

Gang Expert Opinion Testimony

Santa Ana Police Detective Julian Rodriguez testified as the prosecution’s gang expert. Over the years, Rodriguez has gained vast experience with Southern California’s criminal street gangs, including the various Santa Ana street gangs. He defined a criminal street gang in statutory terms (§ 186.22, subd. (e)), but essentially he testified a street gang is any identifiable group of individuals who are constantly engaged in crime.

According to Rodriguez, a person becomes a gang member through family relationships (walk in), by enduring a beating from gang members (jump in), or by committing crimes with gang members (crime in). Individual gang members must “put[] in work” for the gang, which means engaging in any activity beneficial to the gang, such as committing crimes, writing graffiti, or acting as a look out or back up. Putting in work for the gang establishes the member’s worth and respect.

Graffiti, tattoos, monikers, and social media are methods gang members use to advertise their gang affiliation, and brag about criminal activities. So-called tagging crews are groups of graffiti artists with ties to a particular criminal street gang. Tagging crews do not commit crimes, nor do they claim turf.

Notions of respect fuel the violent crime associated with street gangs. Guns and respect go together because a gun is a symbol of violence and the ability to create violence. Moreover, the more revenue a gang generates, the more respect is garnered from rival gangs and the community. “It’s based on criminality and fear.”

Gang members are generally quite willing to use a gun, and proud of the gun-related crimes they commit. They may advertise a crime by putting up graffiti. Rodriguez also explained the tendency of gang members to commit crimes in concert as witnesses, and assistance, or “backup.” As Rodriguez testified, “If they’re going to go write graffiti in a rival area, for example, they may take backup, possibly armed with a gun, and post up in the neighborhood so that they can . . . intimidate people who might be walking by, so [that] they go a different direction.”

“If they’re going to do a shooting, let’s say in a car, someone might be driving, somebody could be a lookout, someone’s going to be the shooter. The more people you have, the more likelihood you’re going to have success in completing these missions.”

Rodriguez testified gang rivalries are serious business. Over the years, Lopers and Walnut Street gang members have murdered each other in turf wars and in retaliation for acts of perceived disrespect.

A “hitup” begins with the question, “Where are you from?” Asking this question, challenges the other person to either claim their gang and risk the consequences, or back down, and often leads to violence. Moreover, Rodriguez explained, “Crossing out a gang’s graffiti is an act of disrespect, a challenge to the gang’s claimed turf, and an indication of rivalry.”

As for the possible ramifications to the perpetrator of disrespect, Rodriguez testified, “It’s been my experience that the response to a disrespect has to be of equal or greater value. So at the very least, I would expect that the gang that was disrespected is going to go cross out the graffiti of the other gang Either the individual who did it, if identified, or any member of that group, can then be targeted for violence, whether it’s a beating or all the way up to stabbing or shooting.”

Rodriguez also testified there are rules to gang-related drive-by shootings. For instance, the gang member is supposed to “get out of the car,” or “at least one foot must be on the ground,” when the shots are fired.

A violation of the one-foot rule, or any other gang rule, could result in the whole gang being “green lit,” which “means on the street or in custody, the members of that gang might be subject to violence”

In Rodriguez’s opinion, a trespass into a rival gang’s turf would be “reason enough” for the disrespected gang members to try to kill the invader. Responding to a hypothetical based on the facts favorable to the prosecution, Rodriguez opined the attempted murder of Anguiano by a member of Walnut Street was in retaliation for the disrespect shown by crossing out their graffiti. The crime benefitted Walnut Street by enhancing its status and deterring future attempts to encroach on the gang’s territory.

He also opined the murder was committed in association with Walnut Street because two Walnut Street gang members acted in concert. In addition, the murder benefitted and promoted Walnut Street because violent retaliation in a rival gang’s territory demonstrated Walnut Street’s viciousness to rival gangs and the community.

Defense

Castro did not testify. Counsel argued Castro did not have the specific intent to murder Anguiano, and the murder was a case of mistaken identity. The court instructed the jury on first degree murder and voluntary manslaughter under theories of imperfect defense of others and heat of passion following an assault.

DISCUSSION

1. Sufficiency of the Evidence

Castro challenges the sufficiency of the evidence to prove both crimes. When addressing a challenge to the sufficiency of the evidence, the reviewing court evaluates the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Story* (2009) 45 Cal.4th 1282, 1296; *People v. Johnson* (1980) 26 Cal.3d 557, 578.)

The same standard applies in cases based primarily on circumstantial evidence. “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]’ [Citation.] “Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.”” (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

a. Specific Intent - Attempted Murder

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citations.] ‘Intent to unlawfully kill and express malice are, in essence, “one and the same.” [Citation.] Express malice requires a showing that the assailant either desires the victim’s death or knows to a substantial certainty that the victim’s death will occur. [Citation.]”” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890.)

With respect to his intent, Castro asserts only a “highly trained marksman” would expect to kill someone from a distance of 150 feet with a single shot, and he relies on a number of attempted murder cases involving multiple shots, or shots taken at close range. He also discounts the impact of his statements to Mercado, and the evidentiary value of the gang expert testimony. We find Castro’s arguments unavailing and *People v. Smith* (2005) 37 Cal.4th 733 (*Smith*) instructive.

In *Smith*, the jury convicted the defendant of two counts of attempted murder after he fired a single bullet in the direction of a mother and her baby. The appellate court affirmed the conviction. (*Smith, supra*, 37 Cal.4th at pp. 745-46.)

After a thorough review of the mental state required for attempted murder, and the interplay between motive and intent, the court observed: “These principles, taken together, reflect that the act of purposefully firing a lethal weapon at another human being at close range, without legal excuse, generally gives rise to an inference that the shooter acted with express malice. That the shooter had no particular motive for shooting the victim is not dispositive, although again, where motive is shown, such evidence will usually be probative of proof of intent to kill. Nor is the circumstance that the bullet misses its mark or fails to prove lethal dispositive—the very act of firing a weapon “in a manner that could have inflicted a mortal wound had the bullet been on target” is sufficient to support an inference of intent to kill.” (*Smith, supra*, 37 Cal.4th at p. 742.)

Again the standard of review compels us to search the record for evidence *in support of the judgment*, and we find substantial evidence here. Anguiano lived in Walnut Street’s territory, but he claimed West Myrtle Street. Castro had ongoing problems with West Myrtle Street taggers, and he expressed frustration because they had ignored his complaints. Castro specifically mentioned Anguiano’s name to Mercado, and Castro knew Anguiano belonged to the CBC tagging crew associated with West Myrtle Street. Thus, before the shooting, Castro knew someone crossed out Walnut Street graffiti on Anguiano’s garage door and wrote West Myrtle Street graffiti on his house.

According to the gang expert testimony, this type of disrespect between rival gang members often leads to violent retaliation, and gun violence is the retaliation of choice. In this case, Castro returned to a rival gang member's house twice in one day over a tagging and turf dispute. The second time, Castro brought a nine-millimeter handgun, stopped his car about 150 feet away from Anguiano and fired a shot at him.

From these credible, reasonable facts, a jury could rationally conclude Castro had the specific intent to kill Anguiano when he fired the shot. Consequently, substantial evidence supports the attempted murder conviction.

b. Identity - Murder

With respect to the murder, Castro questions the jury's conclusions about the weight of the following pieces of evidence: (1) his statement to police; (2) Mercado's testimony; (3) Castro left his home with Gonzalez; (4) Castro's response to Garcia when he returned; (5) Castro generally met the description of the shooter; (6) Castro's participation in the attempted murder; (7) Courette's identification of Mono as the shooter; and (8) the failure by police to locate a nine-millimeter gun in his home.

Castro argues the jury should have weighed the evidence differently and reached a different verdict. But, again, the standard of review requires us to affirm the verdict, "[i]f the circumstances, plus all the logical inferences the jury might have drawn from them, reasonably justify the jury's findings" (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955.) In other words, "our opinion that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." (*Ibid.*)

Moreover, in reviewing the entire record, we accept any logical inferences the jury could have drawn from the circumstantial evidence because the jury, not the reviewing court, must be convinced of the defendant's guilt beyond a reasonable doubt. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357-358.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is

the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.’’ (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) And, a single witness’s testimony is sufficient to support a conviction, unless that testimony “describes facts or events that are physically impossible or inherently improbable” (*Ibid.*)

In this case, Castro shot a nine-millimeter handgun at a rival West Myrtle Street gang member following an act of disrespect in April, and he kept the nine-millimeter handgun he used to commit the crime.

About a month later, an unidentified gang member standing in West Myrtle Street’s turf was shot with the same nine-millimeter handgun. The location of the shooting is roughly a block away from Castro’s house, Castro and Gonzalez left Castro’s house just minutes before the shooting, and Gonzalez was positively identified as the shooter’s companion. These facts, together with the gang expert testimony about the behavior of criminal street gang members, and Castro’s evasive answers when questioned by Courette and the police, provide substantial evidence to support the inference of Castro’s identity as the murderer.

While Courette did not identify Castro as the shooter, and she actually implicated a different Walnut Street gang member, the jury was free to rely on other circumstantial evidence tending to prove Castro’s identity as the murderer. As noted, this court may not reweigh the evidence or reevaluate the credibility of witnesses. (*People v. Green* (1997) 51 Cal.App.4th 1433, 1437.)

2. *Spillover Prejudice*

Citing *People v. Albarran* (2007) 149 Cal.App.4th 214 (*Albarran*) and *U.S. v. Tellier* (2d Cir. 1996) 83 F.3d 578 (*Tellier*), Castro argues the prosecution’s failure to establish his identity as the murderer means the attempted murder conviction must be reversed due to spillover prejudice. We disagree.

The concept of prejudicial spillover effect generally applies to claims of improper joinder of multiple counts (*People v. Soper* (2009) 45 Cal.4th 759, 772, 782), or gang enhancements (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1051).

“Spillover prejudice, sometimes referred to as ‘retroactive misjoinder,’ arises when the ‘joinder of multiple counts was proper initially, but later developments—such as . . . an appellate court’s reversal of less than all convictions—render the initial joinder improper.’ [Citations.]” (*In re Ponce De Leon* (2004) 117 Cal.App.4th 1116, 1121 (*De Leon*).) “If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider ‘whether the benefits of joinder were sufficiently substantial to outweigh the possible “spill-over” effect of the “other-crimes” evidence on the jury in its consideration of the evidence of defendant’s guilt of each set of offenses.’” (*Soper*, at p. 775.)

But Castro did not move to sever the charges below, and his failure to do so forfeits the issue on appeal. (*People v. Romero and Self* (2015) 62 Cal.4th 1, 29.) In addition, the theory of spillover prejudice has no application where, as here, there was no misjoinder of counts. (*De Leon*, *supra*, 117 Cal.App.4th at p. 1121.) In fact, Castro’s attempted application of the spillover prejudice rule relies entirely on his belief the murder conviction should be reversed for insufficiency of the evidence. As noted above, we have concluded otherwise.

Moreover, Castro’s authorities are inapt. *Albarran* and *Tellier* involved the admission of irrelevant, or marginally relevant, evidence that was also extremely prejudicial. (*Albarran*, *supra*, 149 Cal.App.4th at p. 232; *Tellier*, *supra*, 83 F.3d at pp. 580-581.) This case is markedly different. Here, the prosecution joined too related crimes of roughly equal strength. There was no prejudicial spillover effect from the joinder of charges in this case.

3. Ineffective Assistance of Counsel

As noted, Garcia testified Castro and Gonzalez left the house together on the night of the murder, and Castro returned 30 or 40 minutes later. She asked him where he had been, and he told her not to ask. On cross-examination, Garcia conceded Castro may have been gone less than 30 minutes.

During direct examination of the detective who interviewed Garcia after the murder, the prosecutor asked “how long the defendant and . . . Gonzalez were gone for?” The detective responded, “Approximately 30 to 40 minutes.”

Castro argues “an inattentive juror would infer that [Castro and Gonzalez] returned together,” and the detective’s testimony about Garcia’s statements constitutes inadmissible hearsay for which the prior inconsistent statement exception does not apply. On that basis, he argues defense counsel was ineffective for not objecting to this portion of the detective’s testimony. Again, we disagree.

“To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93 (*Benavides*).)

Assuming error, Castro fails to demonstrate prejudice. Regardless of the prosecutor’s inartful question, Garcia said Gonzalez and Castro left together. A few minutes later, a shooting involving the gun Castro used to commit attempted murder was committed a mere block from Castro’s home. Gonzalez was positively identified, and witnesses said he was with a fellow Walnut Street gang member. The jury was free to

believe Castro was not that Walnut Street gang member, and defense counsel's failure to object to the prosecutor's sloppy question does not alter that fact.

Nor are we convinced the jury's request for a read back of the pertinent testimony bolsters Castro's claim. The jury's focus on the issue suggests careful consideration of the evidence. It is not reasonably probable Castro would have achieved a better result had counsel successfully objected. (*Benavides, supra*, 35 Cal.4th at p. 93.)

Furthermore, the court gave CALCRIM No. 318, which told the jury, "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: [1], to evaluate whether the witness's testimony in court is believable, and [2], as evidence that the information in those earlier statements are true."

Castro asserts CALCRIM No. 318 should not have been given because the jury should first determine whether a prior statement was inconsistent before considering it true. However, this precise argument was rejected in *People v. Solórzano* (2007) 153 Cal.App.4th 1026 (*Solórzano*):

"To the extent that CALCRIM No. 318 deviates from CALJIC No. 2.13 by denying the defendant the same jury determination on the issue of inconsistency,' [Solórzano] claims, 'it must be deemed erroneous.' For two reasons, we reject his argument.

"First, Solórzano's argument intimates that CALJIC instructions serve as the benchmark by which to adjudicate the correctness of CALCRIM instructions. He is mistaken. 'The California Judicial Council withdrew its endorsement of the long-used CALJIC instructions and adopted the new CALCRIM instructions, effective January 1, 2006. At the time of [his] trial, former rule 855(e) of the California Rules of Court (now renumbered rule 2.1050) provided that "[u]se of the Judicial Council instructions is strongly encouraged.'" [Citation.]

“Second, Solórzano’s argument betrays an incorrect reading of CALJIC No. 2.13, which straightforwardly allows the jury to use prior statements as substantive evidence without finding those statements inconsistent with his or her testimony (as does CALCRIM No. 318) and which optionally characterizes as inconsistent a witness’s testimony that he or she ‘no longer remembers a certain event’ if the jury disbelieves that testimony.” (*Solóranzo*, *supra*, 153 Cal.App.4th at pp. 1038-1039.)

We agree with the reasoning and result in *Solóranzo*, and reject Castro’s claim CALCRIM No. 318 violated his right to due process.

4. Sentencing Errors

The court imposed a term of 25 years to life for the firearm enhancement attached to the murder based on the jury’s true finding a principal discharged a firearm causing death during the commission of a murder for the benefit of, or in association with, a gang within the meaning of Penal Code section 12022.53, subdivisions (d) and (e)(1)) (all further statutory references are to this code).

Citing *People v. Brookfield* (2009) 47 Cal.4th 583, 593 (*Brookfield*), Castro argues “[i]t appears that the Legislature’s use of the term ‘enhancement’ in section 12022.53(e)(2) was intended to refer broadly to any greater term of imprisonment for a crime that, as here, is committed to benefit a criminal street gang.”

However, *Brookfield* is inapposite. That case did not involve the gang-murder special-circumstance sentence, but the enhanced prison term under section 186.22, subdivision (b)(4)(B) for the gang-related offense of shooting at an inhabited dwelling. (*Brookfield*, *supra*, 47 Cal.4th at pp. 590-591.) And the language of section 12022.53, subdivision (e)(2) specifically excludes any additional gang punishment in that circumstance.

On the other hand, as Castro concedes, a life without the possibility of parole (LWOP) sentence based on a gang special circumstance may be enhanced under section 12022.53, subdivision (d) when the defendant personally discharges the firearm

and proximately causes the victim's death. (*People v. Shabazz* (2006) 38 Cal.4th 55, 59, 70.) The jury made all of the appropriate findings, and the imposition of 25 years to life for a principal's discharge of a firearm causing death is therefore permitted.

Next, Castro argues the court improperly imposed the 10-year gang enhancement on the attempted murder instead of ordering him to serve the 15-year minimum parole eligibility provision. He is correct.

When "a defendant is sentenced to an indeterminate life term for attempted murder, the 15-year parole eligibility provision of section 186.22, subdivision (b)(5) applies rather than the 10-year gang enhancement." (*People v. Arauz* (2012) 210 Cal.App.4th 1394, 1404-1405; accord *People v. Campos* (2011) 196 Cal.App.4th 438, 447, disapproved on other grounds in *People v. Fuentes* (2016) Cal.5th 218, 229, fn. 8.) Thus, we order modification of the court's sentencing minute order and the abstract of judgment by striking the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)), and imposing the 15-year minimum parole eligibility provision (§ 186.22, subd. (b)(5).)

Castro is also correct in asserting the court improperly ordered a parole revocation fine under section 1202.45, which mandates a parole revocation fine *unless the sentence does not include a period of parole*. (See *People v. McWhorter* (2009) 47 Cal.4th 318, 380 [striking parole revocation fine when defendant sentenced to death and no determinate term]; *People v. Oganessian* (1999) 70 Cal.App.4th 1178, 1182 [striking parole revocation fine when defendant received LWOP and indeterminate life sentences]; compare *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [parole revocation fine proper when defendant, in addition to being sentenced to death, also sentenced to an unstayed separate determinate prison term].) Castro received an LWOP sentence. Accordingly, the parole revocation restitution fine must be stricken.

And, finally, Castro correctly requests the court's minute order and abstract of judgment be corrected to reflect he had appointed, and not retained, counsel at trial.

DISPOSITION

The clerk of the superior court is directed to modify the February 13, 2015 minute order, and the abstract of judgment, by: (1) striking the 10-year gang enhancement (§ 186.22, subd. (b)(1)(C)) associated with the attempted murder; (2) imposing the 15-year minimum term of parole eligibility (§ 186.22, subd. (b)(5)) instead; (3) noting Castro was represented by appointed, rather than retained, counsel; and (4) striking the parole revocation fine (§ 1202.45). The clerk of the superior court is further directed to forward a copy of the corrected abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.